Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1994

PENROD DRILLING CORPORATION

Petitioners

VERSUS

EARL WAYNE COATS

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a General Maritime Law case, is the principle of joint and several liability incompatible with the principle of comparative fault, which has already been adopted into the General Maritime Law of the United States, and with the requirement of justice that the parties stand equal before the court?

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The undersigned counsel of record certified that the following listed persons have an interest in the outcome of this appeal. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a).

1. Penrod Drilling Corporation;
2. Maritime Industrial Services, Inc.;
3. Earl Wayne Coats;
4. Herbert, Mouledoux & Bland;
5. Burke & Mayer;
6. Gelpi, Sullivan, Carroll & Gibbens;
7. Bryant, Colingo, Williams & Clark;

8. David L'Hoste;

9. Hytorc, Inc.;

10. Joseph Brochtel;

11. David Shelton; and

12. Thomas Acosta.

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REFERENCE TO OPINIONS

The decision of the District Court is unpublished. The decision of the Court of Appeals is published as Coats v. Penrod, 5 F.3d 877 (5th Cir., 1993).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit entered on October 18, 1993. Suggestions for Rehearing En Banc were filed by two parties, but the Court has not acted on these as of this date.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 10, et. seq. of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the court's Admiralty and Maritime Jurisdiction (Article III, § 2 of the Constitution of the United States) and the General Maritime Law of the United States.

STATUTES INVOLVED

There are no statutes applicable to a resolution of this matter.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

This matter flows from a judgment of the United States District Court for the Southern District of Mississippi, Biloxi Division. The plaintiff, Earl Wayne Coats, sued two defendants, Penrod Drilling Corporation ("Penrod"), and Hytorc M.E., a division of Maritime

Industrial Services ("MIS"), a corporation of the United Arab Emirates. Plaintiff sought damages for injuries which occurred within the course and scope of his employment with MIS, when he was assigned to perform pressure testing services on Penrod's Rig 69 in the Port of Mina Saqr in the territorial waters of the United Arab Emirates.

The District Court applied the General Maritime Law of the United States to this case. It must be emphasized that this is a rare "pure" General Maritime Law case. The Fifth Circuit has affirmed the District Court's determination that Coats was not a seaman under the Jones Act (46 U.S.C. §688), nor a worker covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C §901, et. seq.), since this

act has no application in foreign countries. Accordingly, no statutes are applicable to this situation.

At trial, the jury found that plaintiff, Earl Wayne Coats, was 20% at fault, MIS was 60% at fault, and Penrod was 20% at fault. The jury awarded total damages of $925,000. After reducing the award by the plaintiff's comparative fault, the District Court, over the objection of Penrod, entered judgment in the amount of $740,000, plus interest, jointly and severally against Penrod and MIS. Under the principles of joint and several liability as they presently exist in the General Maritime Law, although Penrod was found liable for only 20% of the judgment amount, plaintiff may, at his sole option, collect his entire

judgment from Penrod, leaving to Penrod the task of collecting back from MIS the 60% share of the judgment for which MIS was found liable. Penrod bears the sole risk of the uncollectability of the remainder of the judgment from MIS. In that event, Penrod will pay four times the amount the jury cast it in damages, a result which is undeniably unfair and unjust.

Penrod respectfully requests this court's consideration of the propriety of the continued application of joint liability principles in the General Maritime Law of the United States.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE APPELLATE COURT

All parties filed timely notices of appeal. On October 18, 1993, the panel of the United States Court of Appeals for the

Fifth Circuit, with a dissenting opinion by Judge DeMoss, and affirmed the District Court's judgment, including the rendering of judgment in the amount of $740,000 jointly and severally against the two defendants. Suggestions for Rehearing En Banc were filed by Penrod and MIS, but the Court of Appeals has not yet acted on these requests.

STATEMENT OF FACTS

On the date of this accident, Penrod's Rig 69 was located in the Port of Mina Saqr within territorial waters of the United Arab Emirates and the rig was jacked-up with its hull out of the water. The rig was as close to shore as possible and access to the rig was via a gangway from the rig to the shore. The rig's crane was capable of reaching the roadway

on shore in order to load and discharge items from trucks on the roadway.

Earl Wayne Coats was employed by MIS, a United Arab Emirates corporation. Coats was living in the U.A.E. with his father, who worked in the U.A.E. for another company, and Coats had a U.A.E. work permit. The primary business of the Hytorc Division of MIS was providing hydraulic-operated torque wrench services for assembling and disassembling oil well equipment on drilling rigs working in the area. After some minimal in-house experimentation, the management of MIS hypothesized that the hydraulic pumps which powered its torque wrenches could be adapted to provide hydraulic pressure for pressure testing of equipment on rigs. Prior to the date of the accident, MIS

solicited Penrod's U.A.E. field office, offering its services to provide pressure testing of equipment on Penrod's Rig 69. Shortly before the date of the accident, Penrod engaged MIS to provide pressure testing services.

For the second day of the Penrod pressure testing job, MIS re-assigned its employee who had been on the job and assigned the plaintiff, Earl Wayne Coats, to substitute aboard the Penrod rig. Coats had no prior experience conducting pressure testing and his training in pressure testing consisted of a short meeting with his MIS supervisor at 11:00 p.m. on the preceding evening. On the date of the accident, while Coats was conducting pressure testing operations, a piece of equipment failed under pressure.

Mr. Coats, who had left a position of safety and had exposed himself to the items under pressure, was struck by pressurized fluid and knocked to the deck of the rig, resulting in an injury to his knee. At trial, the jury determined that the accident was 60% the fault of MIS, 20% the fault of the plaintiff himself, and 20% the fault of Penrod.

SUMMARY OF THE ARGUMENT

Penrod and plaintiff were each found by the jury to have been 20% at fault for Coats' accident, and MIS was determined to have been 60% at fault. The Court entered judgment against Penrod jointly and severally liable with MIS, thus exposing Penrod to payment of 100% of the judgment amount. Joint and several liability is incompatible with the principles of

comparative fault. A defendant's liability should not increase beyond its proportionate share of responsibility due to another defendant's fault any more than its liability should increase due to plaintiff's fault. Penrod and plaintiff were found equally at fault and taken together their fault is substantially less than the fault of MIS; yet Penrod is exposed to 100% of the judgment. This is inequitable.

Joint liability was adopted into the General Maritime Law of the United States from the British Common Law in the 19th Century. Joint liability is historically one of two counterbalancing principles arising out of the legal theory of the 19th Century that all parties are responsible for all of the consequences of

their negligence. Thus, under the theory of that era, a plaintiff who was at fault in the slightest degree would bear all the consequences of his negligence and could recover nothing. This was the principle of contributory negligence. At the same time, a defendant who was slightly at fault would be held jointly liable with his co-defendants, and would bear all the consequences of his slight negligence should the innocent plaintiff chose to recover the entire judgment from the slightly negligent, but jointly liable, defendant. This was the counterbalancing principle of joint liability. Neither was fair nor just, but neither side had any advantage under these counterbalancing principles. Today, the contributory negligence half of the couplet has given

way to proportionate fault. Joint liability must give way as well, and for the same reasons.

Well over a majority of the states have abolished or modified the joint and several liability doctrine. There is a policy consensus among the states that the doctrine of joint liability is unsuited to a comparative fault environment. The application of joint and several liability is unfair and inequitable.

ARGUMENT

MAY IT PLEASE THE COURT:

In a General Maritime Law case, is the principle of joint and several liability incompatible with the principle of comparative fault, which has already been adopted into the General Maritime Law of the United States, and with the

requirement of justice that the parties stand equal before the court?

> "The law is no respecter of persons, and all persons...stand equal before the law and are to be dealt with as equals in a court of justice."

With those words, United States District Judge Charles Pickering began his charge to the jury which decided this case. At trial, Penrod and Coats stood as equals in the eyes of justice and after trial they stood as equals in the eyes of the jury with respect to responsibility for the accident and damages. Yet, under the principles of joint and several liability, Penrod finds itself facing a payment of over $800,000.00 to satisfy a verdict in which the jury found that Penrod's proportional responsibility for the total damages was only $185,000.00, precisely

the same extent to which the plaintiff was himself found responsible. Penrod and Coats were both found by the jury to have been tortfeasors and it was determined that the fault of each contributed 20% to the accident. Coats was not an innocent party.

If Coats is unable to collect the 60% of his damages attributed to MIS, then this is unfair and unjust. However, if under joint and several liability, Penrod has to pay Coats the 60% of his damages that the jury attributed to the fault of MIS, that is equally unfair and unjust, as Penrod is no more and no less responsible for Coats' damages than is Coats himself. This is not equal treatment of parties who are entitled to be treated as equals in the eyes of the law and justice, and who

are equally responsible for the damages in this case.

The decision below suggests that it is not unjust to place the risk of non-recoverability from MIS solely on Penrod, as the decision to do business with MIS was that of Penrod, not Coats. While this is true, it is equally true that the decision of Coats to accept employment with MIS and thereby himself "do business" with MIS was solely that of Coats, not Penrod.

The General Maritime Law is a body of law developed by the judiciary and applicable in maritime cases in the absence of a relevant governing statute. East River S.S. Co. v. Transamerica Delaval, Inc., 476 U.S. 858 106 S.Ct. 2295 90 L.Ed.2d 865 (1986); United States v.

Reliable Transfer Co., 421 U.S. 397, 409, 95 S.Ct. 1708, 1714, 44 L.Ed.2d 251 (1975); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160-161, 40 S.Ct. 438, 440, 64 L.Ed. 834 (1920). "Drawn from state and federal sources, the General Maritime Law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." East River, supra, at 2299; Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630, 79 S.Ct. 406, 409, 3 L.Ed.2d 550 (1959); Romero v. International Terminal Operating Co., 358 U.S. 354, 373-375, 79 S.Ct. 468, 480-481, 3 L.Ed.2d 368 (1959).

As the this Honorable Court recognized in Reliable Transfer, supra, it is the duty of the courts to re-examine the rules of the General Maritime Law and

to appraise the validity of their underpinnings and the propriety of their continued application. In Reliable Transfer, supra, this Court noted that the "divided damages rule", which had been adopted from British law in 1855, no longer appeared to achieve justice, had been criticized by other courts as unfair, illogical, unjust and arbitrary, and had been rejected by most other jurisdictions. The result achieved by the rule "'hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence...' G. Gilmore and C. Black, The Law of Admiralty 528 (2nd Ed., 1975)." (Reliable Transfer, 421 U.S. at 407, 95 S.Ct. at 1713.) Precisely the same can be said of the continued application in the

General Maritime Law of the doctrine of joint and several liability.

Joint liability is a common law concept which was adopted into the General Maritime Law in The Phoenix Insurance Company v. The Steamboat Atlas, 93 U.S. 302 (1876). The common law at that time considered that every person was responsible for all of the consequences resulting from his own fault. If a plaintiff was at fault in the least, he recovered nothing; if one defendant was at fault in the least, the innocent plaintiff could elect to recover all of his damages from that defendant, regardless of the degree of fault of another defendant. Justice Clifford set forth these concepts in detail in writing for this Honorable Court in The Atlas, supra. The key factor

in the common law dichotomy of contributory negligence/joint liability is that the plaintiff must have been without fault, or he recovered nothing, in which case joint liability was not an issue. Repeatedly, in The Atlas, supra, Justice Clifford refers to "the innocent party" being entitled to full compensation, "parties without fault" bearing no loss, "innocence" entitling the loser to full compensation from the wrongdoer, and the wrongdoer being liable to the "innocent loser". It is clear that the common law had developed a trade-off. Contributory negligence was unfair to slightly liable plaintiffs and joint liability was equally unfair to slightly liable defendants.

This Honorable Court in Edmonds v. Compagnie General Transatlantique, 443

U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1975), recognized that the contributory negligence of the plaintiff did not affect his ability to recover under joint liability in maritime cases. Thus, The Atlas was interpreted as having adopted into the General Maritime Law only one-half of the common law dichotomy of contributory negligence/joint liability.

Virtually every jurisdiction in this country has rejected contributory negligence as a bar to recovery by plaintiffs and the majority of states have now rejected the counterbalancing inequity to defendants - joint liability. Although the Fifth Circuit in Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988), rejected a prior argument on this point, the decision in Simeon was based in part

upon the consideration set forth by the court on page 1429 of the opinion that:

> **"most jurisdictions which have adopted comparative negligence have retained the common law rule of joint and several liability"**, quoting W. Prosser and P. Keeton, Prosser and Keeton on the Law of Torts §67 at 475 (1984).

This ten year old observation by these respected scholars is no longer true. Today, almost three-fourths of the states have repealed the inequity of joint liability. The continued use of the traditional joint and several liability doctrine has been much criticized, and in fact has been modified by a majority of the states. At least thirty-three states have either abolished or modified joint and several liability.[1] Utah, Wyoming,

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[1] Pressler and Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L.Rev. 651, 656.

North Dakota, Kansas, Ohio and New Mexico have completely eliminated joint and several liability.[2]

Other states have modified the doctrine such that it would be inapplicable to the facts of the case at bar.[3] Other states have modified the

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[2] See Utah Code Ann. Section 78-27-38 (1988); Wyo. Stat. Section 1-1-109 (D)(1988); N.D. Cont. 32-03.2 (1987); Ohio Rev. Code Ann. Section 2315.19 (A)(2) (1981); Brown v. Keill, 580 P.2d 867 (Can.) (1978).

[3] Washington, Wash. Rev. Code Section 4.22.070 (1989); Arizona, Arz. Rev. Stat. Ann. Section 12-2506 (1988); Georgia, Ga. Code Ann. Section 51-12-33 (1988); Idaho, Idaho Code Section 6-803(3)-(7); Missouri, Mo. Rev. Stat. Section 509.050.41 (1988); Montana, Mont. Code Ann. Section 27-1-703(2)(3) (1987); New Mexico, N.M. Stat. Ann. Section 43-3-1 (1986); Iowa, Iowa Code Ann. Section 668.1-668.3, 619.17 (1988); Oklahoma, Boyles v.

doctrine of joint and several liability in a variety of ways, usually making a defendant liable for some but not all of a judgment, in excess of its proportion at fault.[4] This development, in so many

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Oklahoma, Natural Gas Co. 619 P.2d 613 (Okla).

[4] Nevada, Nev. Rev. Stat. Section 41.141(3) (1986); Texas, Tex. Rev. Stat. Ann. Art. 2212(a) (1988); Indiana, Ind. Code Ann. Section 34-4-33-5 (1988); Louisiana, La. Civ. Code Ann. Art. 2324 (1988); Oregon, Or. Rev. Stat. Section 18.485 (1985); Pennsylvania, 42 PA Cons. Stat. Ann. Section 7102(b) (1982); Minnesota, Minn. Stat. Ann. Section 604.01(1) (1988); Alaska, Ala. Stat. 09.17.080 (1988); Connecticut, Conn. Stat. Section 52-Section 72(h) (1988); Florida, Fla. Stat. Section 768.81 (1981); Illinois, Ill. Rev. Stat. Section 110 (1988); Michigan, Mich. Comp. Laws Ann. Section 6006304 (1987); Minnesota, Minn. Stat. Section 604.02 (1989); New Hampshire, N.H. Rev. Stat. Ann. Section 507-B:9 (1988); New York, N.Y. Civ. Proc. Section 1601, 1602 (1987); West Virginia, W.Va.

jurisdictions, arises from the understanding that the traditional rule of joint and several liability is not compatible with the comparative fault system:

> "The principle of loss apportionment by shares of negligence that isolates a defendant from liability to the plaintiff for loss due to plaintiff's negligence also should serve to isolate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant."[5]

The action of approximately two-thirds of the states in enacting

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Section 55-7B-9 (1988); California, Cal. Civ. Code Section 1431.1-5 (1988); South Dakota, S.D. Certified Laws Ann. Section 15-8-15.1 (1988).

5 Pearson, Apportionment of Losses Under Comparative Fault Laws - An Analysis of the Alternatives, 40 La.L.Rev. 343, 362 (1980).

legislation acknowledging the need for changing the law of joint and several liability should be recognized as a fundamental statement of policy, and an occasion for appropriate change in the maritime law. An example is the Supreme Court's adoption of a general maritime law wrongful death remedy in Moragne v. States Marine Lines.[6] In discarding the former rule that the maritime law provided no remedy for a death in state territorial waters, the Court was most influenced by the adoption of wrongful death remedies, modifying the common law, by virtually all state legislatures and Congress:

> "We need not, however, pronounce a verdict on whether The Harrisburg, when decided, was a

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[6] Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772 (1970).

correct extrapolation of the principles of decisional law than in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway...
..."

These numerous and broadly applicable statutes taken as a whole make it clear there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight, not only in matters of statutory construction but also in those of decisional law. [citation omitted]

> It has always been the duty of the commonlaw court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of commonlaw principles, many of them derived from earlier legislative exertions."[7]

This Honorable Court recently reaffirmed the duty of admiralty courts to look to legislative developments. "In this era, an admiralty court should look primarily to these legislative enactments for policy guidance".[8]

The action of the state legislatures is a sure indication that the traditional doctrine of joint and several liability is

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7 Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 1781-83 (1970).

8 Miles v. Apex Marine Corp., 111 S.Ct. 317, 323 (1990).

unsuited to the modern environment of comparative fault. The state legislation on this subject indicates a policy decision that the law must balance plaintiff's interest in obtaining as much as possible against the interests of the defendant in paying no more than his percentage of fault the jury has established as due. This court should, in the exercise of its powers as an admiralty court, acknowledge the change in social policy, and craft an appropriate modification in the law of joint and several liability.

The dual inequities of contributory negligence/joint liability, taken together, do not make any sense nor do they serve justice. Clearly, neither taken separately can be justified.

Joint liability is judge-made law, not statutory law. As this Honorable Court pointed out in Reliable Transfer, supra, where a judge-made rule of maritime law simply replaces one unfairness with another unfairness and creates a result which is not just and equitable, and where the rule exists due to the inertia of age rather than due to merit, the court should change it. This was also the position taken by the dissent in Edmonds, supra.

The panel in the Court of Appeals felt itself constricted by the "policy established by the Supreme Court" in Edmonds. However, Justice White, writing for this Court in Edmonds, made it clear that the law under consideration was "an interface of statutory and judge-made law." (Edmonds, 433 U.S. at 272, 99 S.Ct.

at 2762.) As Justice White stated at the outset, "once again, we have before us a question of the meaning of the 1972 Amendments [to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq.]." (Edmonds, supra, 433 U.S. at 259, 99 S.Ct. at 2756.) Justice White clearly stated in Edmonds, supra, that the Court was not free to change a judge-made rule which had been relied on by Congress in reaching a delicate balance of the rights of the parties in the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act.

That is not the case here. This is a pure General Maritime Law case. It is not a Jones Act case like Simeon, supra, and it is not a LHWCA case like Edmonds, supra. There are no constricting statutes

involved here and there is no interface between judge-made law and statutory law. Congress has not passed any law applicable to this case in reliance on the continuation by the courts of the doctrine of joint liability in pure general maritime law cases. Edmonds, supra, should not have controlled the Fifth Circuit's consideration of Simeon, supra, on the General Maritime Law question and Edmonds, supra, should not control this case, contrary to the belief of the Fifth Circuit panel. No longer do a majority of jurisdictions in the country continue to apply the doctrine of joint liability, as was the case when Simeon, supra, was decided.

Penrod and Coats are equally responsible for the accident and damages

in the case. All considerations of justice and fairness lead to the conclusion that they should share equally in the risk of the inability to collect the judgment against MIS. Coats was the employee of MIS; he was not a stranger. He accepted a job in the U.A.E. and moved there, allegedly to make a career for himself in the Middle East. Coats had no reservation about going to the U.A.E. to work for MIS, and he has no complaint about going there to collect his judgment. The fact that Coats was the injured party is equally his own fault as it was Penrod's and this fact affords him no additional rights.

CONCLUSION

The joint liability issue should be considered by this Honorable Court because

this issue is one of exceptional importance. Joint liability no longer achieves justice; it is unfair, illogical, unjust and arbitrary; it has been rejected by most of the states. The result achieved by application of the rule "hardly commends itself to the sense of justice." The situation here is indistinguishable from the situation this Honorable Court faced in deciding Reliable Transfer, supra. The contributory negligence half of the contributory negligence/joint liability couplet has given way to the proportionate fault rule. It is time for joint liability to give way as well. The General Maritime Law is an evolving body of law, consisting of old rules, modified rules and new rules. It is not an anachronism of outdated

concepts. The liability of parties to a general maritime law action is now determined proportionately. It follows inexorably that parties who have been found proportionately at fault must share proportionately in the risk of the inability to collect on the judgment from another party also at fault. Only then will justice be served.

Certiorari should be granted for consideration of this important issue.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief has been served on all counsel of record list below by depositing same in the United States Mail, postage prepaid, addressed to them at their respective offices, this 14th day of January, 1994.

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